IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.121 OF 1991

The Thane Municipal Corporation ..Appellant
(Original Defendant)

versus

Shri Govind Ramchandra Patil ..Respondent.

Shri R.S.Apte for the Appellant

Shri K.K.Malpathak for the Respondent

Coram : S.R.Sathe, J.

Dated : 3rd April, 2006

ORAL JUDGMENT.

1. Appellant, Thane Municipal Corporation, the Original Defendant in Regular Civil Suit No.154 of 1979 has preferred this appeal against the Judgment and Order passed by the Court of 6th Additional District Judge, Thane in Civil Appeal No.406 of 1983 whereby the judgment and order passed by the trial Court granting the permanent injunction restraining the defendant Corporation from demolishing the structure was confirmed by the Fist Appellate Court. For the sake of convenience hereafter the parties shall be referred to as plaintiff and defendants.

2. Brief facts giving rise to this appeal are as under:

. The suit property was owned and possessed by the plaintiff. He wanted to carry out construction of garage on the said open space. He, therefore, submitted an application dated 5.5.1978 alongwith plan to the defendant Municipal Council. He did not receive any reply regarding the said notice from the defendant Council for a period of more than 60 days. He, therefore, ultimately carried out construction of the garage. Thereafter some officer of the defendant Municipal Council noticed the construction and consequently the defendant Council issued notice dated 7.2.1979 to plaintiff calling upon him to demolish the structure. Plaintiff, therefore, filed suit for permanent injunction against the defendant council on 17.2.1979.

3. The defendant Municipal Council filed its written statement and opposed the suit claim. The defendant contended that no application as alleged by the plaintiff was received by the defendant council and as such there was no question of granting any permission and consequently the

application of Section 189(4) of the Maharashtra Municipality Act (hereafter referred to as the said Act).

4. The defendant Council also took the contention that suit is bad for want of notice under Section 304 of the said Act.

5. On these pleadings the learned trial Judge framed issues. After considering the evidence adduced by both the parties, the learned trial Judge came to the conclusion that the defendant Corporation had failed to inform the plaintiff about his application whereby he had sought permission to carry out construction and as a result of the same as per provisions of Section 189(4) of the said Act there was deemed permission and as such the notice issued dated 7.2.1979 was illegal. Naturally, he decreed the suit in plaintiffs favour. Being aggrieved by the same, the defendant council preferred first appeal. However, the same also came to be dismissed. The above mentioned order is challenged by the Defendant Council in the present appeal.

6. From the perusal of the record it appears that while admitting the appeal, this Court (Coral Agarwal, J.) has passed the following order:

> " Grounds A to E raise substantial Question of Law. Admit."

The said grounds are as under :

a) Whether the title of the suit property vests in the plaintiff?

b) Whether the Respondent-Plantiff had obtained any permission from the Appellant-Defendant for constructing structure over the said open property?

c) Whether the Plaintiff has encroached over the suit property unauthorizedly and constructed the structure over it?

d) Whether the structure was unauthorised and illegal and whether the Appellant-Defendant is entitled to demolish the same?

e) Whether the Respondent-Plaintiff was right

in contending that he had submitted an application to the Appellant-Defendant for permission?

7. In this First Appeal before me Shri R.S.Apte, learned Advocate for the defendant Municipal Council has urged only two points. Firstly, he submitted that both the courts below have not properly appreciated the evidence on record and have failed to notice that the alleged letter sent by the plaintiff was not accompanied by necessary documents required under Section 189 of the said Act. Secondly, he canvassed before me that there was in fact no sufficient evidence to show that the letter or application in question was sent by the plaintiff as alleged and it was received by the defendant Municipal Council. He, therefore, submitted that the appeal be allowed and the order passed by the Courts below be set aside. As against this Shri Malphatak learned Advocate for the plaintiff supported the judgment and order passed by the Courts below.

8. The fate of this appeal depends on the question as to whether the plaintiff has proved that he had submitted an application for carrying out

construction as contemplated under Section 189 of the said Act and whether the same was received by the defendant Municipal Council. At the outset it must be mentioned that though at the time of trial the case has been made out by the plaintiff that the application in question was sent by post and it was under Certificate of Posting. It is worth to note that in the plaint the plaintiff had no where specifically averred that he had sent the application by post under Certificate of Posting. All that he has mentioned in the plaint was that he submitted an application to defendant Municipal Council and at that time he had also given the necessary plan and it was duly received by the defendant Municipal Council. The defendant Council had specifically contended that they had not received any such application and as such there was no question of scrutinising the same and giving any further reply to the said application. In view of this, the burden was on the plaintiff to prove beyond doubt that such letter/application was sent by him under Certificate of Posting. It is true that he has produced on record one certificate issued by the postal authorities which bear the rubber stamp dated 5.5.1978. However, curiously

enough on the letter it is nowhere mentioned at the top that the said letter is sent under Certificate of Posting when the defendants witnesses have categorically stated that such letter was not received by the defendant Municipal Council and the defendant Municipal Council did not give any reply to it either rejecting or accepting the said letter and granting permission within 60 days from the receipt of the said letter, still then that will not make any difference so far as the main question is concerned. If we peruse Section 189 of the said Act, it is very clear that it is of no use simply tendering the application to seek permission for construction, but as per the provisions of the said law it is necessary to accompany the said application with necessary plan duly signed by licensed architect. Not only that, the plaintiff has also clearly admitted in his cross examination that he was aware of this position. On this background if we see the application in question then it is crystal clear that the same is accompanied by only one map which is not signed by any one, leave aside the Licensed Architect or surveyor. So, it is obvious that the application forwarded by the plaintiff was in fact incomplete in

every respect and as such can not be regarded as the real application under Section 189 of the said Act. Consequently, when such defective application is forwarded by him and no reply is given by the Defendant Municipal Council for the same, no fault can be found with the Defendant Council and the plaintiff would not be entitled to get advantage of the provision. So, it is very clear that in the instant case it cannot be said that by virtue of application of Section 189(4) and (6) of the said Act there was deemed permission to carry out the construction of the garage as asked by the defendant. So, the construction that was carried out by the defendant was obviously without any authority and without permission. Naturally, defendant Corporation was certainly entitled to issue notice of demolition of such garage to the plaintiff. However, it seems that both the Courts below have lost sight of this fact and as such reached to a wrong conclusion. Hence, the appeal is allowed. The Order passed by the Courts below is set aside and the plaintiff’s suit for permanent injunction is dismissed with cost.

9. At this stage the learned Advocate for the

Respondent Plaintiff submitted that the operation and execution of the above order be stayed. However, considering the peculiar facts of this case and the fact that the plaintiff had not even cared to forward the proper plan, I am not at all inclined to stay the operation of the above order. However, having regard to the fact that since the year 1978 the garage in question is standing at the said place, the appellant/defendant Municipal Council shall not act upon their notice dated 7.2.1979 till 30.6.2006.

(S.R.Sathe, J.)

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